

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

ERIC CHRISTOPHER COURTNEY

APPELLANT-RESPONDENT,

**v.
DIRECTOR OF REVENUE**

RESPONDENT-APPELLANT.

DOCKET NUMBER WD77646 Consolidated with WD77657

DATE: October 27, 2015

Appeal From:

Henry County Circuit Court
The Honorable Wayne P. Strothmann, Judge

Appellate Judges:

Division Four: Alok Ahuja, Chief Judge, Presiding, Gary D. Witt, Judge and John M. Torrence,
Special Judge

Attorneys:

Matthew D. Lowe, Clinton, MO and Jeffrey S. Eastman, Gladstone, MO, for appellant-
respondent.

Rachel M. Jones, Jefferson City, MO, for respondent-appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

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Appellant, the Director of Revenue (“Director”), challenges the trial court’s judgment setting aside the revocation of Eric Courtney’s (“Courtney”) driving privileges. Following a bench trial, the circuit court excluded the results of Courtney’s breath test because there was no evidence that the simulator for the breath testing device had been calibrated against a National Institute of Standards and Technology-approved thermometer as required by the Code of State Regulations (“CSR”). On appeal, the Director alleges that the circuit court erred in excluding the breath test because (1) Courtney failed to timely object on a specific foundational ground and (2) other evidence admitted contained sufficient information to demonstrate compliance with the CSR. Courtney cross appeals, arguing the trial court erred in finding that the breath test was otherwise admissible despite the requirement in the CSR that the equipment be calibrated by the use of three different standard solutions.

Majority Opinion holds:

AFFIRMED

- (1) The trial court did not err in excluding the results of Courtney’s breath test because the Director failed to introduce foundational evidence that the simulator for the breath testing device had been calibrated with an approved thermometer. Courtney objected on the ground that a foundation had not been laid pursuant to 19 CSR 25-30.051 and, although the regulation contained multiple requirements for calibration, Courtney’s objection referenced the Director’s failure to meet the “requirements” in “in multiple respects.” This put the Director on sufficient notice that proper foundation had not been laid. Accordingly, the trial court did not abuse its discretion in sustaining the objection.
- (2) Given our holding in Point I, we need not address the Director’s Point II or Courtney’s cross appeal.

Judge Ahuja's Dissenting Opinion, States:

Judge Ahuja dissents. In his view, Courtney did not assert a timely and specific objection based on the NIST-thermometer requirement, and the trial court therefore lacked authority to exclude the breath test results on the basis of that foundational issue. With respect to Courtney's separate argument that the calibration of the breath analyzer was not performed using the required number of simulator solutions, Judge Ahuja would hold the case pending the Missouri Supreme Court's decision in *Stiers v. Director of Revenue*, No. SC94840, which raises the same issue.

Majority Opinion by Gary D. Witt, Judge with Special Judge Torrence joining October 27, 2015
Dissenting Opinion by Alok Ahuja, Chief Judge, Presiding

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